UNIVERSITY OF TORONTO
FACULTY OF LAW

PROPERTY LAW
CASEBOOK VOL II

Professor Abraham Drassinower

Winter 2016

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CHAPTER TEN: TRADEMARKS

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NOTES
(from Jim Phillips, *Property Law: 2008-2009*)

1) Diekson J. states at one point that: There is nothing in the evidence supporting the view that in the present ease the owner of the eentre was aeting out of eaprice or whimsy or mala fides. Do you think his deeision would have been different if the owner had aeted so? In *Rnsso* v. *Ontario Jockey Clnb*, (1987), 62 O.R. (2d) 731 (H.C.J.) Russo argued that she could not be exeluded from pari-mutuel betting faeilities otherwise open to the publie. The Joekey Club had banned her beeause she was a very skilled bettor and won too mueh. Boland J. simply followed Harrison, noting that if the Supreme Court refused to balanee private property rights with pieketing, there was even less of a ease to be made for balaneing property against a "right to bet." Could it be argued that barring a person from faeilities otherwise open to the publie for betting beeause they won too often is certainly eaprieious and eould well amount to bad faith.

2) *Harrison* v. *Carswell* has been eited in more than thirty subsequent eases, generally for the prineiple that a property owner may exelude whoever he or she wishes. The most unusual assertion of this prineiple is probably *Michelin & Cie* v. *C.A.W.* [1997] 2 F.C. 306 (T.D.). As part of a eampaign to organise workers at Michelin plants in Nova Seotia the union distributed pietures of the Miehelin Man showing it with a foot raised to erush a Miehelin worker. The eourt first deeided that Michelin had eopyright in the Miehelin Man and then, having rejeeted a eonstitutional defence based on freedom of expression, used *Harrison* as support for the prineiple that Aprivate property [in this ease a eopyrighted image] eannot be used as a loeation or forum for expression.

3) In *Committee for the Commonwealth of Canada* v. *Canada* (1991), 77 D.L.R. (4th) 385 (S.C.C.) the Supreme Court of Canada dealt with the issue of whether the federal government could bar people from distributing politieal propaganda and soliciting membership at an airport. As this was an aetion against government regulation the ease turned on the freedom of expression guarantee in the *Charter of Rights*.

The Court held that the Charter proteets the right to expressive aetivity in publie airports. The judges did not agree, however, on much else, and six separate opinions were given. For eurrent purposes the judgments of Lamer C.J.C., L'Heureux-Dube J. and MeLaehlin J. are important. L'Heureux-Dube J. held that there was a prima faeie right to expression on all government property, and that any limitations must be justified under section 1 of the *Charter,* the limitation provision.

Lamer C.J.C. and MeLaehlin J. both held that there was an "internal" limitation within the freedom of expression guarantee. Lamer C.J.C. found that while government property was not like private property, and was presumptively a plaee where an individual had a right to express opinions, he or she eould do so only if the form of the expression was eompatible with the funetion of the plaee and did not interfere with the ordinary workings of the airport and the interests of the airport authorities and passengers. MeLaehlin J. foeused both on the nature of the expression and on the forum. Some government property was traditionally "private", some

traditionally "public". Once it was established that the property in question was the latter, and that the expression promoted one of the purposes for having a guarantee of freedom of expression, there was prima facie a breach, and any limitation had to be justified under section 1.

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CHAPTER SIX:

INTRODUCTION TO THE COMMON LAW OF REAL PROPERTY

THE DOCTRINES OF TENURE AND ESTATES

(This chapter taken from Jim Phillips, *Property Law: 2008-2009*)

A) INTRODUCTION TO TENURE AND ESTATES

Although much of the system of tenure explained below is obsolete, a basic understanding of the historical origins of the English law of real property is indispensable to an understanding of the conceptual bases of that law in common law Canada. As in England, land "owners" in Canada are still not true owners, but are tenants in fee simple of the crown.

K. Gray, Elements of Land Law

It is not easy to imagine, *tabula rasa*, how best to construct a coherent and systematic body of rules governing rights in and over land. During the course of eight centuries, English law has developed a framework of rules which functions today with admirable success, but it is far from obvious that, if the task of construction were begun again, the end result would necessarily resemble the law of real property in its present form. The conceptual points of departure which lie at the back of the law of real property contain little, if anything, of a particularly compelling or a priori nature. There is indeed nothing inevitable about the eventual shape of modern land law, but it remains true that the law of today is still heavily impressed with the form of ancient legal and intellectual constructs .... From its earliest origins land law has comprised a highly artificial field of concepts, defined with meticulous precision, with the result that the inter-relation of these concepts is not unlike a form of mathematical calculus. The intellectual constructs of land law move, as Professor Lawson once said, ' in a world of pure ideas from which everything physical or material is entirely excluded'. The law of land is logical and highly ordered, consisting almost wholly of systematic abstractions which 'seem to move among themselves according to the rules of a game which exists for its own purposes.' It is from this interplay of naked concepts that the creature of modem land law ultimately derives. English law cannot be properly understood except in the light of its history, and it is in the doctrines relating to tenures and estates that the historical roots of English land law are to be found.

The Doctrine of Tenures The origin of the medieval theory of English land law was the Norman invasion of England in 1066. From this point onwards the King considered himself to be the owner of all land in England. Since the Normans brought with them no written law of land, they initiated in their newly conquered territory what was effectively a system of landholding in return for the performance of services. According to this feudal theory, all land

was owned by the Crown and was granted to subjects of the Crown only upon the continued fulfillment of certain conditions. Land was never granted by way of an actual transfer of ownership, and the notion of absolute ownership other than in the Crown was therefore inconceivable. Pollock and Maitland were later to explain quite simply that all land in England must be held of the king of England, otherwise he would not be the king of all England'. In their view, to have wished in medieval times for an ownership of land which was not subject to royal rights was 'to wish for the state of nature'.

It was a direct consequence of this theory that all occupiers of land were at best regarded as 'tenants', i.e. as holders of the land who in return for their respective grants rendered services of some specified kind either to the King himself or to some immediate overlord who, in his turn, owed services ultimately to the Crown. In this way there emerged a feudal pyramid, with the King at its apex and it was the doctrine of tenures which defined the terms of the grant on which each tenant enjoyed his occupation of 'his' land.

The feudal services rendered by 'tenants' were an integral part of early English land law, and in time became standardized and identifiable by the type of service exacted and performed. The different methods of landholding (differentiated according to the form of service required) were known as 'tenures', each tenure indicating the precise terms on which the land was held. The tenures were themselves subdivided into those tenures which were 'free' (and therefore formed part of the strict feudal framework) and those tenures which were 'unfree' (and appertained to tenants of lowly status who were ... effectively little better than slaves).

The common labourer or 'villein tenant' originally had no place on the feudal ladder at all. He merely occupied land on behalf of his lord, and it was the latter who was deemed by the common law to have 'seisin' of the land thus occupied. Villeinage (later called 'copyhold tenure'), although of an unfree nature, came in practice to enjoy increasing protection.

The kinds of service provided by those who enjoyed free tenure included, for instance, the provision of armed horsemen for battle (the tenure of 'knight's service') or the performance of some personal service such as the bearing of high office at the King's court (the tenure of 'grand sergeanty'). These tenures were known as 'tenures in chivalry', and were distinct from the 'spiritual tenures' of frankalmoign and divine service (by which ecclesiastical lands were held in return for the performance of some sacred office) and the somewhat humbler 'tenures in socage' (which obliged the tenant to render agricultural service to his lord). With the passage of time, the military and socage tenures were commuted for money payments, but all tenures carried with them 'incidents' (or privileges enjoyed by the lord) which were often more valuable than the services themselves.

The consequence of medieval theory was the emergence of a kind of feudal pyramid of free tenants, with the actual occupiers of the land (the 'tenants in demesne') forming the base, their overlords ('mesne lords') standing in the middle - both receiving services and rendering services in their turn - and with the King at the apex receiving services from his immediate

tenants ('tenants in chief'). Pollock and Maitland described the system of tenures in terms of a series of 'feudal ladders', noting that 'theoretically there is no limit to the possible number of rungs, and ... men have enjoyed a large power, not merely of adding new rungs to the bottom of the ladder, but of inserting new rungs in the middle of it.' This process of potentially infinite extension of the feudal ladder was known as subinfeudation. However, subinfeudation carried the disadvantage that it tended to make the feudal ladder long and cumbersome, and in time the process of alienating land by substitution became more common. Under the latter device the alienee of land simply assumed the rung on the feudal ladder previously occupied by the alienor, and the creation of a new and inferior rung was no longer necessary.

By the end of the 13th century a more modern concept of land as freely alienable property was beginning to displace the restrictive feudal order, and this evolution culminated in the enactment of *Quia Emptores* in 1290. The *Statute Quia Emptores* constituted a pre-eminent expression of a new preference for freedom of alienability as a principle of public policy. The major innovation contained in the Statute was the prohibition for the future of alienation by subinfeudation. Following the enactment of 1290 only the Crown could grant new tenures, and the existing network of tenures could only contract with the passage of time. Every conveyance of land henceforth had the effect of substituting the grantee in the tenurial position formerly occupied by his grantor: no new relationship of lord and tenant was created by the transfer. It is the *Statute Quia Emptores* which - quite unnoticed - still regulates every conveyance of land in fee simple today. Every such conveyance is merely a process of substitution of the purchaser in the shoes of the vendor, and the effect of the Statute during the last seven centuries has tended towards a gradual levelling of the Feudal pyramid so that all tenants in fee simple today are presumed (in the absence of contrary evidence) to hold directly of the Crown as'tenants in chief.

The dismantling of the old feudal order was later accelerated by more direct measures aimed at a reduction of the forms of tenure. Under the *Tenures Abolition Act 1660*, almost all free tenures were converted into 'free and common socage' or 'freehold tenure'. There is therefore only one surviving form of tenure today - freehold tenure in socage - but the conceptual vestiges of the doctrine of tenures live on. It is still true that every parcel of land in England and Wales is held of some lord - almost invariably the Crown. It is still technically the case that no one owns land except the Crown, and that all occupiers of land are merely - in the feudal sense tenants. However, for all practical purposes the doctrine of tenures is now obsolete. Tenure of land for an estate in fee simple is now tantamount to absolute ownership of the land - or as close to total control of land as is nowadays possible. The doctrine of tenures has long been overtaken in importance by that other doctrine which explains much of English land law - the 'doctrine of estates'.

The Doctrine of Estates Whereas the doctrine of tenures served within the framework of medieval theory to indicate the conditions on which a grant of land was held, the doctrine of estates defined the effective duration of that grant. The doctrine still plays a fundamental role today in the classification of interests in land law.

Since it was intrinsic to the structure of medieval land law that the only owner of land was the King, it followed that his subjects - be they ever so great - were merely 'tenants', occupying the land on the terms of some grant derived ultimately from the largesse of the Crown. It was not initially clear what (if anything at all) the individual tenant could say he 'owned' .... The answer to the conundrum was provided by the 'doctrine of estates'. As Professor F.H. Lawson pointed out, the solution arrived at in English law was 'to create an abstract entity called the estate in land and to interpose it between the tenant and the land.' The object of the ownership enjoyed by each 'tenant' was not the land itself but a conceptual 'estate' in the land, each 'estate' differing from the others in temporal extent. Thus by resorting to an ingenious compromise, English law resolved at a stroke the apparent contradiction of theory and reality in the ownership of land. Although at one level the 'estate' in the land merely demarcated the temporal extent of the grant to the 'tenant', in practice it provided a functional (and theoretically acceptable) substitute form of ownership in respect of land. The doctrine of estatessurvives to the present day. Like the medieval 'tenant', the modern proprietor of land owns in some strict sense not the land, but rather an 'estate' in the land which confers specific rights and powers according to the nature of the 'estate'.

The terminology of 'estates' introduced a fourth dimension of time into the description of the terms of grant enjoyed by the 'tenant'. Each 'estate' recognised by the common law simply represented a temporal 'slice' of the bundle of rights and powers exercisable in respect of land, and in the doctrine of estates there was developed a coherent set or rules classifying the diverse ways in which rights in land might be carved up in this dimension of time. It was the concentration on the rights and powers appurtenant to differing kinds of 'estate' which so sharply distinguished the common law view of real property from the continental emphasis on full ownership in the abstract sense (*dominium*). An 'estate' denoted the duration of a grant of land from a superior owner within the vertical power structure which emanated from the Crown; and no man could grant another any greater 'estate' than that which he himself owned (*nemo dat quod non habet*).

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B) TYPES OF ESTATES: K. Gray, Elements of Land Law

The freehold estates The three freehold 'estates' known to the common law were the fee simple, the fee tail and the life estate, and each must now be examined in turn .... The key to the distinctions between them lies in the notion of time. The essence of the doctrine of estates has never been more elegantly captured than in the argument presented before the Court of Exchequer in the 16th century in *Walsingham's Case*. Here it was said that: "the land itself is one thing, and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time".

then ...[the land] becomes his own". Alternative dispositions were provided in the event that Archie McKellar did not have any "family". One proposition advanced at trial was that this should be construed as meaning "to Archie McKellar and his family" and thus as "to Archie McKellar and his heirs" - that is, as a fee tail. In the event the court rejected this interpretation in favour of saying that Archie had been given a life estate combined with a conditional fee simple. The condition was that he have children, and if he met that condition he would receive the fee simple. (Conditional fees are discussed in detail in a section (d) below).

Note on Presumptions and Words of Limitation

An individual owning a fee simple estate can obviously choose, when divesting him or herself of it, to simply give the full fee simple estate to the grantee. Or he or she could choose to give some lesser estate, such as a life estate, to the grantee. And if the words used in the will or conveyance (deed) are clear as to what is being transferred, there will be no problem in determining what was intended.

But what if the terms of any instrument - an *inter vivos* deed (a transfer from a living person) or a will - leave uncertain what was intended? Because of the importance of land in the medieval world the common law required strict adherence to conveyancing formulae if a person wished to transfer *inter vivos* an estate in fee simple. The grant had to say: "to A and his heirs." Any other form of words - "to A in fee simple, to A forever, to A and his successors" - would create only a life estate.
Note that in the phrase "to A and his heirs" the words to "to A" are known technically as words of purchase, words that designate the person to whom the interest is granted. The words "and his heirs" are called words of limitation, words that designate the nature of the interest granted.

The strict common law rule on conveyancing has long been altered by statute. The *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C-34, s. 5 states:

5 (1) In a conveyance, it is not necessary, in the limitation of an estate in fee simple, to use the word "heirs".

(2) For the purpose of such limitation, it is sufficient in a conveyance to use the words "in fee simple" or any other words sufficiently indicating the limitation intended.

(3) Where no words of limitation are used, the conveyance passes all the estate, right, title, interest, claim and demand that the conveying parties have in, to, or on the property conveyed, or expressed or intended so to be, or that they have power to convey in, to, or on the same.

(4) Subsection (3) applies only if and as far as a contrary intention does not appear from the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

(5) This section applies only to conveyances made after the 1st day of July, 1886.

NOTE. This statute was not passed in 1990. As the note says, this has long been the rule. Every so often provincial and federal statutes are consolidated and re-passed so that the original statute and all is amendments are in place. These are called 'Revised Statutes', hence RSO stands for Revised Statutes of Ontario.

The alienation of realty by will was treated differently at common law. Land was not devisable at all until the passage of the *Statute of Wills*, 1540, and thereafter the courts took a more lenient view of the need for correct words of limitation, a view based on the rule that wills are to be construed in an attempt to find the true intention of the testator or testatrix. A similar provision to the one cited above is now to be found in the *Succession Law Reform Act*, R.S.O. 1990, c. S-26, s. 26, which states:

26. Except where a contrary intention appears by the will, where real property is devised to a person without words of limitation, the devise passes the fee simple or the whole of any other estate or interest that the testator had power to dispose of by will in the real property.

that he was of the Jewish faith. On the other hand, I do not doubt that one who accepted all the tenets and observed all the rules would assert that some of the individuals I have mentioned were certainly not of the Jewish faith. It would surely depend on the extent to which the particular individual accepted the tenets and observed the rules. I cannot avoid the conclusion that the question whether a man is of the Jewish faith is a question of degree. The testator has, however, failed to give any indication what degree of faith in the daughter's husband will avoid, and what degree will bring about, a forfeiture of her interest in his estate. In these circumstances the condition requiring that a husband shall be of the Jewish faith would, even if standing alone, be void for uncertainty. I would allow this appeal.

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NOTES

1) In *Re Down* (1968), 2 O.R. 16 (C.A.) the testator's will provided in part:

When my said son, Harold Russell Down, arrives at the age of thirty years, providing he stays on the farm, then I give, devise and bequeath all of my estate both real and personal of every nature and kind whatsoever and wherever situate unto my said sons Stanley Linton Down and Harold Russell Down to be divided between them equally share and share alike.

Harold Down, 26 years old and not farming, applied for construction of the will in order to ascertain his rights to his father's estate. The trial judge held that the will created a condition precedent not void for uncertainty. Harold Down appealed, arguing that he had a contingent interest which would vest when he reached 30, attached to which was a condition subsequent which was void for uncertainty.

Do you think the appeal should succeed?

2) In *Blathwayt* v. *Lord Cawley and Others*, [1975] 3 All E.R. 625 (H.L.) the court considered the validity of a condition which prohibited future heirs of the testator from inheriting, or divested the estate once inherited, if any of them should "Be or become a Roman Catholic". Following *Clayton* v. *Ramsden*, is this uncertain?

Ellison that governs, but the rule to be applied is that which is invoked in the interpretation and construction of covenants in a deed of conveyance or like instrument.

[Hogg J.A. then cited cases for the proposition that words in a covenant were to be read with "regard ... to the object which they were designed to accomplish" and "in an ordinary or popular and not in a legal and technical sense".]

In his very carefully prepared argument, one of the matters referred to by Mr. Morden was the fact that those who are responsible for the Dominion census ascertain, for the various territorial divisions of Canada, the population and the classification of that population, under various heads, including nationality and race. The information from which such classification is made is obtained through the inquiries made by census commissioners, enumerators or agents .... It would not be possible for those whose duty it is to obtain information in taking a census of the population to ascertain the precise degree or percentage of any race or blood in an individual. The classification must necessarily be made having regard to the word "race" in its ordinary and popular sense. If the language of cl. (f) of the covenant is regarded in its ordinary and popular sense, this clause cannot be said to be void for uncertainty because the exact degree of race or blood in any person among those set out in the aforesaid clause can not be ascertained .... For the reasons I have given, I think the appeal should be dismissed, with costs against the appellants.

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NOTES

1) Following the Court of Appeal's decision in *Re Noble and Wolf* the Ontario legislature amended the *Conveyancing and Law of Property Act* by adding the following section [now s. 22]: "Every covenant made after the 24th day of March, 1950, that but for this section would be annexed to and run with land and that restricts the sale, ownership, occupation or use of land because of the race, creed, colour, nationality, ancestry or place or origin of any person is void and of no effect." Consider precisely how this would affect the covenant in *Re Noble and Wolf*?

2) An appeal of the Ontario Court of Appeal decision was allowed by the Supreme Court of Canada, but principally on the ground that the covenant did not satisfy the requirements of an enforceable restrictive covenant: see *Noble* v. *Alley*, [1951] S.C.R. 64. (Note that we will deal with restrictive covenants later in the course). Four of the seven judges also stated, as an alternative ground of invalidity, that the covenant was uncertain.

3) For a full discussion of this case and its context, see J. Walker, "*Race*". *Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Toronto: Osgoode Society for Canadian Legal History 1997), chapter four.

NOTES

1) A number of Canadian cases have dealt with conditions and public policy in the context of inherent characteristics or beliefs. Consider whether the following would have been decided differently had the courts had the reasoning of the Ontario Court of Appeal in Re Canada Trust and Ontario Human Rights Commission before them?

a) In Re Rattray (1973), 38 D.L.R. (3d) 321 (Ont. H.C.), affd. (1974), 44 D.L.R. (3d) 533 (C.A.) approximately $13M was left to Queen's University to provide scholarships or bursaries. One of the conditions was that they should not be awarded "to any student who is a communist, socialist or a fellow traveller". On an application by the University the condition was struck down for uncertainty. The case generated some publicity and a letter writer to the Globe and Mail, 17 September 1973, said in part: "The university ... had no qualms about accepting the money on this basis. Now that ... Rattray is ... dead they apparently find it morally proper to alter his conditions, without the acceptance of which the money would not have been given to them in the first place .....[H]is money will henceforth be made available to persons whose political philosophy he deplored, even though he took pains to develop the point that it should not. I believe this court's decision should be appealed, not only to safeguard the intents of the deceased person who has given so generously, but to safeguard the inviolability of trust funds in general and the intents that gave them birth".

On the issue of uncertainty, the letter writer agreed that there "is ... no precise definition" of terms like socialist, communist, or fellow traveller. But the problem could be dealt with by asking each student who applied to the fund: "can you in conscience subscribe to its intent in accepting this scholarship"?

b) In Re Hurshman (1956), 6 D.L.R. (2d) 615 (B.C.S.C.) the testator left property which his daughter would inherit "provided she is not at that time [the time when the will took effect] the wife of a Jew". This will was made a month after Mr. Hurshman's daughter married Ivan Mindlin, who all parties to the case agreed was by "lay definition" Jewish. McInnes J. held that the condition "is directly contrary to public policy" because "in order for the daughter to inherit she must divest herself of her husband".

c) Re Metcalfe (1972), 29 D.L.R. (3d) 60 (Ont. H.C.) involved a testator who provided for a scholarship fund in his will. McGill was to provide a scholarship for a male medical student unable to finance his own studies, who was a Protestant of good moral character, had received a high school education in Ontario, and had shown athletic ability. When the university was informed of this it disclaimed the gift, stating in a letter that "our Scholarship Committee ... will not recommend acceptance of discriminatory gifts such as this for ' a Protestant of good moral character, educated in Ontario and who possesses athletic ability' "

Any recipient of property is entitled to disclaim, and that might have been the end of the matter. However, the testator's widow argued that the gift should stand as one given to charity, that McGill was only the selector of the recipient, not the recipient itself, and that the court should appoint another "selector". After construing the precise terms of the bequest the court held that McGill was really the recipient, and that the gift therefore failed.

2) The Ontario Human Rights Commission takes the position that "[s]cholarships or awards that designate a specific minority or ethnic group infringe the [Human Rights] Code, unless they qualify as a "special program" that is designed to relieve economic hardship or disadvantage, or designed to achieve equality of opportunity." Elsewhere it states that "this policy applies whether the organization or body conferring the scholarship or award is public or private. It also applies to trusts." A preliminary issue in the Re Canada Trust case had been whether the Commission had jurisdiction over the Leonard Foundation, and the Court of Appeal had held that it did not.

3) Two recent charities cases have referred to the Re Canada Trust decision. In Re Ramsden Estate (1996), 139 D.L.R. (4th) 746 (P.E.I.S.C.-T.D.) at issue was a bequest to the University of Prince Edward Island to create bursaries or scholarships to be awarded "to protestant students". Beyond this preference, nothing else was stated as to why the testatrix had chosen as she did. The court first found that this could not be given effect to because the University Act, R.S.P.E.I. 1988, c. U-4 prohibited the University from administering any such funds, on the grounds that they required the imposition of a "religious test". However, it went on to find that the fund could be administered by some other body and thus achieve the same purposes. That brought into play the question of whether the trust established by the bequest was generally contrary to public policy, and the court held that it was not, in the process not even referring to the apparent "public policy" of non-denominational University scholarships. With reference to the Leonard Foundation case, the court said: "that case is distinguishable from the present one, in that the trust in that case was based on blatant religious supremacy and racism. There is no such basis for the trust in this case". Thus "motive" seemed to play a large role.

In a more recent case, University of Victoria v. The Queen (2000), 185 D.L.R. (4th) 182 (B.C.S.C.), a woman had left the University money to establish two bursaries, one for "a practicing Roman Catholic student" in education and the other in music for "a Roman Catholic student". The court dealt with two issues. First, it decided that the terms did not violate the Human Rights Code of the province because the trust fund did not constitute a "public" relationship between the University and the public. Here the University was simply the trustee appointed under the will of a private citizen to give effect to a private bequest. Second, it held that the terms did not violate public policy. That doctrine should be invoked "only in clear cases", and "the terms of the scholarship in Re Leonard are clearly offensive and distinguishable from those before me". The court had "no hesitation in concluding that a scholarship or bursary that simply restricts the class of recipients to members of a particular religious faith does not offend public policy". It is unclear whether the distinction drawn by the court between this case and Canada Trust was motive, or the fact that religion only was involved, or both.

4) An unusual public policy case is Re Wishart Estate (1992), 46 E.T.R. 311 (N.B .Q.B.) Clive Wishart's will directed that his four horses were to be given to the RCMP to be shot. His executors applied to the court for directions, and the case received much publicity, with a number of petitions asking that the provision not be carried out. The evidence at trial showed that Wishart was very fond of the horses and was concerned that they would be badly treated after he died. The New Brunswick S.P.C.A. undertook to care for the horses, and Riordan J. held that the animals should be given to them and thereby Wishart's real intention would be carried out. But he went on to say that the provision was in any event contrary to public policy. Public policy was "difficult to define" and "can be ... subjective", he said, eschewing the usual "unruly horse" metaphors. In this case the direction to destroy the horses served "no useful purpose". It would "benefit no one and be a waste of resources and estate assets".

5) The relationship between the right of an owner to do what he or she wants with property and anti-discrimination law was addressed directly in L'association A.D.G.O. v. Catholic School Commission of Montreal (1979), 112 D.L.R. (3d) 230 (Que S. C.). The Commission offered to the public generally weekend rentals of its buildings. But it refused to rent them for a weekend conference to L'Association A.D.G.Q. because, in the words of Beauregard J., "petitioner is an organization that has as its principal object the organizing of homosexual men and women in order to defend their interests" and "respondent submits that homosexuality is a practice which is condemned by the highest authorities of the Catholic Church, and that consequently the exclusion of petitioner as a lessee is justified by the religious or educational character of respondent, a non- profit institution." The court considered three provisions of Quebec's Charter of Human Rights and Freedoms:

Section 6: Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

Section 10: Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction exclusion or preference based on race, colour, sexual orientation, sex, civil status, religion, political convictions, language, ethnic or national origin or social condition. Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

Section 12: No one may, through discrimination, refuse to make a juridical act concerning goods or services ordinarily offered to the public.

From these provisions the court concluded that "whatever may be the justification of respondent's decision on other than legal grounds, the refusal contravenes s. 12 of the Charter of Human Rights and Freedoms." The Commission, however, argued that its action was saved by section 20 of the Charter, which reads: "A distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for a job, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory."

Beauregard J. dealt with this argument as follows: "While I accept that, as a question of fact, homosexuality is a practice which is condemned by the highest authorities of the Catholic Church, and that respondent is a non-profit institution which has as its object to provide Catholic education, I am of the opinion that, within the confines of the present case, respondent has not succeeded in showing that it should benefit from the exception provided by s. 20 of the Charter. One may certainly imagine cases where respondent might invoke s. 20 of the Charter and refuse to contract with another person by alleging an exclusion justified by its religious or educational character. There is no point, however, in evoking these cases here .... Interpreted strictly, s. 20 does not say that s. 10 does not apply to nonprofit institutions which have an educational or religious character, but it does say that an exclusion invoked by a non-profit institution must be "justified" by the religious or educational character of that institution. If there exist effectively in a given situation certain facts which would make such an exclusion, in the eyes of the directors of a nonprofit institution acting in good faith, a logical and rational consequence of its religious or educational character, it is not for the Courts to put themselves in their place and exercise the discretion which is theirs. But in the complete absence of a rational connection between the religious or educational character of an institution and a discriminatory practice, it falls to the Courts to intervene in order to sanction such practices.

In the present case, respondent has decided to offer to the general public the rental of its buildings. Respondent has even granted leases to non-Catholic churches and atheist or agnostic political parties. On the fringes of this more or less commercial practice I see no connection between respondent's religious or educational character and its decision to exclude the petitioner association as a lessee on account of the ideas which this group advances .... [T]he real problem is this: respondent refuses to rent to petitioner because it apprehends the deleterious effect which the rental of a building to a homosexual association would have on its Catholic students, it being accepted that homosexuality is a practice condemned by the Catholic Church. It is thus an apprehension which is perhaps justified but not permissible with respect to ss. 12 and 10 of the Charter of Human Rights and Freedoms."

6) In Fox v. Fox Estate (1995), 10 E.T.R. (2d) 229 (Ont. C.A.) a testator left his widow and executor, Miriam, a life interest in 75 per cent of his estate. She was also his executor and trustee, and in that capacity had a power to use the capital ("encroach" on it) for the benefit of his grandchildren. What was left of the estate after the widow's death was to go to the testator's son Walter. Walter had two children by his first marriage, and in 1989 decided to marry again to a woman who was his secretary and not Jewish. Miriam Fox did not like this, and used the power of encroachment she held as a trustee to give her grandchildren almost all the residue of the estate. The Court of Appeal disallowed her actions, and the case is largely concerned with the law relating to the discharge of their duties by trustees - specifically about the use of "extraneous" considerations when exercising a discretionary power. But one of the three judges, Galligan J.A., accepted the trial judge's finding that the widow was motivated by dislike of Walter's choice of marriage partner, specifically the fact that she was not Jewish. He then stated, inter alia: "It is abhorrent to

contemporary community standards that disapproval of a marriage outside of one's religious faith could justify the exercise of a trustee's discretion. It is now settled that it is against public policy to discriminate on grounds of race or religion". As authority for this last sentence he cited the Canada Trust case. He then stated: "If a settlor cannot dispose of property in a fashion which discriminates upon racial or religious grounds, it seems to me to follow that public policy also prohibits a trustee from exercising her discretion for racial or religious reasons". Galligan J. A. acknowledged that while there were past decisions which "upheld discriminatory conditions in wills", counsel in the present appeal had not been prepared to argue that these were still correct, that "any court would today uphold a condition in a will which provides that a beneficiary is to be disinherited if he or she marries outside of a particular religious faith".

Do you think this is a correct reading of the Canada Trust decision? Do you think this ought to be the law? Galligan J.A. accepted that as a practical matter a testator could choose not to benefit somebody because of dislike of the religion of their spouse, but thought that irrelevant: "The exercise of a testator's right of disposition is not subject to supervision by the court. But a trustee's exercise of discretion is subject to curial control".

7) The following story appeared in the *Wall Street Journal*, 25 August 2000: When Bernard Manger died in 1995, he left behind a will that disinherited two of his four children from his $48 million estate. The reason: They had married people who weren't born Jewish. He counted on his nephew to secure his wishes. His nephew is Sen. Joseph Lieberman, the vice-presidential candidate. "He was like an older brother to me", says Mr Lieberman, ... Nevertheless, he adds, "I was shocked by the will and in a certain sense embarrassed by it".

The Manger will is an intriguing family tale, but also something more. It thrust Mr Lieberman into a family role that is in many ways a metaphor for the role he now plays on a national stage: as a conciliator trying to bridge the world of Orthodox Jews and the more secular society of millennial America. Ben Manger was a self-made man who parlayed a trade-school education and stint working on airplane wiring in the Army into a small business started in his mother's garage. Over the years his company, Manger Electric Co, became an international supplier of high-tech wiring, and Mr Manger, who lived in Stamford, Conn., amassed a fortune through frugality and hard work. Mr Lieberman lived with his parents in his grandmother's home in Stamford as a young boy, for years bunking in the same room with his "Uncle Bennie", his senior by 22 years. The two men remained close, and in the early 1990s, Mr Manger informed the senator that he had named him executor of his estate.

During his lifetime Mr Manger gave away large sums, sometimes anonymously.... Mr Manger was a strict but devoted and caring father, relatives say, though at times the relationship with some of his children could be stormy.... As he grew older, Mr Manger became more and more concerned that intermarriage was threatening the existence of the Jewish people. And he worried that his own family was contributing to the diminution because his eldest daughter and son married people who weren't born Jewish. Both spouses

converted to Judaism, though not in the Orthodox fashion Mr Manger would have liked.... In 1976 he disinherited his daughter Joyce Maskart, now 50 years old. Three years later, he cut out his son Marc Manger, now 46. When he rewrote his will in 1994, he made his intentions as clear as they could be: "I deliberately and intentionally bequeath and devise nothing [to the two] since they have already departed from the Jewish religion", he stated.... Mr Manger's two other children, twins Stephen and Renee, now 41 years old, were to receive $50,000 a year for life, adjusted for inflation - so long as neither married outside the faith and each lived "as a Jew"....

Two surprises awaited Mr Lieberman, the executor: His uncle had amassed a $48.2 million estate - far more than anyone had figured - and his two beloved cousins weren't legally entitled to any of it. "I was upset about it and troubled about it, and I felt badly for my cousins", Mr Lieberman recalls. "These were my cousins and I love them".... The will requires Mr Lieberman to play a rather intrusive role in the lives of his cousins' families. Mr Manger pledged to pay his grandchildren's college tuition - so long as they attended Sabbath services twice a month and joined a campus-based Jewish organization. He also required his beneficiaries to either have jobs or care for their young children. He authorized Mr Lieberman "to incur all reasonable expense and to hire all services and persons" needed to enforce the will. But the senator says, "We're not going to hire inspectors; we're family"....

The senator quickly moved to try to modify the will's harshest provisions, interpreting his own appointment as trustee and executor as a signal from the grave. "He knew who he was making the executor", Mr Lieberman says. "He knew that these were my cousins and that I love them, and that by my nature I'm not as hard as the will was. He knew what I would do". Mr Lieberman was aided in his search for guidance by what he now calls a "miraculous expression of what my uncle wanted". Going through the father's effects shortly after the accident, the disinherited son, Marc, found an unsigned draft of a more recent will in his father's briefcase. According to Mr Lieberman, that document offered to reinstate the two children, as long as their spouses converted to Judaism according to orthodox rites, and the children now are beneficiaries....

Though humanely motivated and approved by a probate court, the senator's actions raise a question: Did he have the right to overturn the wishes of a dead man who had trusted him to carry out his will? Estate lawyers talk of what they call the "dead hand of the grave theory" - the idea that the deceased shouldn't be able to unduly tie up the lives of those they have left behind. "The more unusual and restrictive a will becomes, the more doctrinaire it is, the greater the chance it will be disputed" in court, says Robert Shapiro, head of trusts and estates at Ropes and Gray the Boston law firm that specializes in managing estates of the wealthy. Mr Lieberman says simply: "I felt what I was doing was right; I was carrying out his intentions".

CHAPTER SEVEN:

EASEMENTS

(This chapter taken from Jim Phillips, *Property Law: 2008-2009*)

A) INTRODUCTION

An easement is one of the class of rights in land known as "incorporeal hereditaments", or sometimes as "servitudes". It is essentially the right of one landowner to go onto the land of another and make some limited use of it. It is not a "natural right", it does not come with the fee simple, and must therefore be created as part of the relationship between the two landowners. There are many types of easements, in the sense that there are many different kinds of things which can be the subject of an easement. There is also more than one way to create an easement. Perhaps the most common kind of easement is the right of way created by express agreement of the parties, and I will use that paradigmatic situation as an illustration

Imagine that A owns land bordered on three sides by woods, and on one side by a road. A wishes to sell part of the land, and B wishes to buy part of it. But A wants to sell a part that does not border on the road. B is not going to buy if getting to the grocery store entails, at best, hacking a path through the woods - assuming that B has a right to go through the woods. If not, a helicopter will be required. The solution is simple - as part of the agreement by which she buys the land from A, B also obtains the right to cross A's land to get to the road. Presumably A will extract some price for this, some increase in B's purchase price, but it matters not to the law whether payment is given, only that the agreement has been made.

Easements are a relationship between two parcels of land - the dominant tenement and the servient tenement. In this example the land that is reached by crossing the other parcel is the dominant tenement; the land that is crossed is the servient tenement, it serves the dominant tenement.

If an easement has been created by one of the methods acceptable to the law (an issue dealt with in sections (c) and (d) of this chapter), and if the right granted meets the necessary test as being the kind of thing allowed by the law of easements (an issue discussed immediately below in section (b)), then it will generally run with the land, be a part of title. That is, if the easement is created during the period that A and B own the two pieces of land, and A then sells to C and B sells to D, C and D are in the same position as landowners as A and B were. This is what makes the easement a property right, for the original agreement between A and B could be enforced merely as a contract, as could any other agreement between them. But if the particular right created by the initial contract is an easement, it becomes part of the title, part of the fee simple that each successor owner has, it has an existence independent of the identity of the owner of the land at any given time.

to the surrounding houses as such, and constitutes a beneficial attribute of residence in a house as ordinarily understood. Its use for the purposes, not only of exercise and rest but also for such domestic purposes as were suggested in argument - for example, for taking out small children in perambulators or otherwise - is not fairly to be described as one of mere recreation or amusement, and is clearly beneficial to the premises to which it is attached. If Baron Martin's test is applied, the right in suit is, in point of utility, fairly analogous to a right of way passing over fields to, say, the railway station, which would be none the less a good right, even though it provided a longer route to the objective. We think, therefore, that the statement of Baron Martin must at least be confined to exclusion of rights to indulge in such recreations as were in question in the case before him, horse racing or perhaps playing games, and has no application to the facts of the present case.

For the reasons which we have stated, Danckwerts J. came, in our judgment, to a right conclusion in this case and, accordingly, the appeal must be dismissed.

NOTES

1) *Re Lonegren et al and Rueben et al* (1988), 50 D.L.R. (4th) 431 (B.C.C.A.) concerned the requirement that the dominant and servient tenement be owned by different persons. At the time of the creation of the easement one tenement was owned by Mr and Mrs Reuben as joint tenants, the other by Mr Reuben and another person as tenants in common. Successors-in-title to the servient tenement argued, unsuccessfully, that this was tantamount to there not being different owners of the two tenements. The trial judge had held that ownership was sufficiently separate, and the Court of Appeal agreed, although without reasons.

2) In *Ellenborough Park* the court asks whether the easement is "inconsistent with the proprietorship or possession of the alleged servient owners". What policy considerations inform this part of the test for an easement?

3) A owns a piece of waste ground, and agrees to sell half to Wal-Mart. Wal-Mart intends to use the land for a new store, and makes an agreement with A for the use of A's retained part of the waste ground as a parking lot. Over the next couple of years about 100 cars a day are parked on A's land, the parked cars using about half of the area. A then sells to C, who tells Wal-Mart it cannot use the parking lot any longer. Wal-Mart claims it has an easement for parking. What arguments would you use on C's behalf?

NOTES:

(taken from Jim Phillips, *Property Casebook 2008-2009*)

1) Although it was not neeessary to do so, Lederman J. went on to discuss whether a right of publieity/ right of aetion for appropriation of personality survived the death of the subject; that is, whether it deseended to heirs. He held that it did, noting, inter alia, that "[t]he right of publieity ... proteets the commereial value of a person's eelebrity status. As sueh, it is a form of intangible property, akin to eopyright or patent, that is deseendible.... The right of publicity, being a form of intangible property ..., should deseend to the celebrity's heirs. Reputation and fame can be a eapital asset that one nurtures and may ehoose to exploit and it may have a value much greater than any tangible property. There is no reason why sueh an asset should not be devisable to heirs."

Lederman J. also dismissed the estate's seeond elaim, that it held eopyright in the conversations with Carroll. He stated that "for eopyright to subsist in a work, it must be expressed in material form and have a more or less permanent enduranee" and that "a person's oral statements in a speeeh, interview or eonversation are not reeognized in that form as literary creations and do not attraet eopyright proteetion".

An appeal to the Court of Appeal in Gould Estate was dismissed (unreported judgment, 1998, QL [1998] O.J. no 1894), but on the basis that Carroll owned eopyright in the photographs, eaptions and text whieh appeared in the book.

2) The eonsequenees of reeognizing the same kind of personality right as the eourts in the United States have been criticized in M.A. Flagg, "Star Crazy: Keeping the Right of Publieity Out of Canadian Law" (1999) 13 Intelleetual Property Journal. There it is argued that the law favours "the rights of sueeessful and well-known individuals over the rights of the public to depict, use, parody or honour many of the cultural ieons of our time". Flagg suggests that the parameters of any publicity right should be legislated, beeause legislation would eonsider both the rights of ereators with those of users and with Charter of Rights values sueh as freedom of expression and equality.

3) As may be inferred from Gould Estate, the eommon law does not generally reeognise what we might call a 'right of privaey' in our personalities. There are exeeptions, ineluding section 5 of the Quebec Charter of Human Rights and Freedoms, whieh reads: "Every person has a right to respeet for his private life". That section was applied in Aubry v. Editions Viee-Versa Inc [1998] 1 S.C.R. 591 Paseale Aubry brought an aetion against a photographer and a magazine for taking and publishing, without her eonsent, a pieture of her sitting on the step of a building in downtown Montreal. The Supreme Court of Canada held that this was an infringement of the plaintiff's right to privacy under the Quebee Charter. The majority judgment of L'Heureux-Dube and Bastaraehe JJ. stated: "that right must inelude the ability to eontrol the use made of one's image, sinee the right to one's image is based on the idea of individual autonomy". The right to privaey needed

to be balanced against "[t]the public's right to information" and against another person's right to freedom of expression. Thus there were circumstances in which a person lost control of the right to determine when his or her image was used; one obvious example was that of a public figure acting in the public domain, another was that of someone photographed as part of a crowd scene but who was not the subject of the photograph. But in this case those considerations did not apply, and the publishers were liable even in the absence of any defamation or other prejudice.

4) Some common law provinces have privacy Acts, which provide some protection. That of British Columbia (Privacy Act, R. S.B.C. 1996, c. 373) makes it a tort to "violate the privacy of another." It goes on to say that "The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, given due regard to the lawful interests of others." It also states, presumably in response to the problem of "papparazi" (of which I have little personal experience), that "privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass."

In a different section the BC Act codifies common law publicity rights, stating: "It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of ... property or services, unless that other ... consents to the use for that purpose." In Poirier v. Wal-Mart Canada Corp, [2006] Carswell BC 1876 (B.C.S.C.) the plaintiff was a store manager for Wal-mart who did consent to his name and photograph, accompanied by a welcoming message, to be used for the opening of a new Wal-mart store which he was going to be the manager of. But shortly thereafter he was dismissed for unacceptable accounting practices. Five weeks after his dismissal an extensive advertising campaign was run featuring him. The trial judge held that the dismissal "must surely be interpreted to cancel the consent previously provided." He distinguished a number of other cases, including Krouse, principally on the ground that in them the individual was not recognisable. Poirier was awarded $15,000 in compensation.